From: jim@jameshochberglaw.com
Sent: Friday, April 25, 2014 9:02 AM
To:
Cc:
Subject: Budget Committee Testimony

I understand that the testimony was heard on Wednesday, however, I hope you will consider this late testimony with respect to charging real property taxes to churches.

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ALLIANCE DEFENDING
FREEDOM

ALLIANCE DEFENDING FREEDOM'S CHURCH PROJECT

"FREE THE PULPIT" LEGAL MEMORANDUM

April 2008

"Let an untaxed Gospel be preached, in an untaxed churchhouse, from an untaxed pulpit; let the emblem of a crucified, but risen Christ be administered from an untaxed altar, and, as the spire points heavenward, . . . let it stand forever untaxed." *(Remarks of Rep. Whitaker, Debates of the Kentucky Constitutional Convention, 1890).*

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INTRODUCTION[1]

In 1954, the United States Congress passed, without debate or analysis, an amendment to Internal Revenue Code §501(c)(3) that imposed a restriction on non-profit, tax exempt entities, including churches. The new restriction stated that a non-profit tax exempt entity could not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."[2] The amendment was offered by then-Senator Lyndon Johnson. No official reason was given for the amendment, but most scholars believe that Johnson offered the amendment to restrict a private foundation that was supporting his opponent in the election. The amendment foreshadowed a drastic change for churches' First Amendment rights.

Historically, churches had frequently, and with great fervor, spoken for and against political candidates for office.[3] In 1800, during the presidential election of

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[1] ADF does not endorse or oppose political parties or candidates, nor does it urge allegiance to any political party or candidate. ADF does believe that churches and pastors have the freedom to plainly speak truth from Scripture about the qualifications of candidates for public office regardless of the candidate's political affiliation. Pastors who encounter any legal difficulties from exercising their right to freely speak from the pulpit on these matters, should ask ADF to review their situation by calling ADF immediately at (800) TELL-ADF.

[2] The words "or in opposition to" were added by Congress in 1987.

[3] See attached Appendix A for examples of historical sermons endorsing or opposing political candidates for office. These printed examples represent only a fraction of the unprinted sermons that were delivered, but not memorialized, in our nation's history.

Thomas Jefferson, churches attacked him for purportedly being a deist.[4] "Churches . . . engaged openly in the presidential campaigns of Thomas Jefferson," where one preacher warned his congregation that they would be "forced to hide their Bibles in wells" if Jefferson was elected. "[5] The Dutch Reformed minister, Rev. William Linn

> produced a pamphlet, *Serious Considerations on the Election of a President*, and asked the following questions: "Does Jefferson ever go to church? How does he spend the Lord's Day? Is he known to worship with any denomination of Christians? . . . Will you then, my fellow-citizens, with all this evidence . . . vote for Mr. Jefferson?" Linn's church went unpunished for his criticism of Jefferson. Jefferson's supporters, in turn, freely defended Jefferson, also without sanction: "The charge of deism . . . is false, scandalous and malicious; there is not a single passage in the *Notes on Virginia*, or any of Mr. Jefferson's writings, repugnant to Christianity; but on the contrary, in every respect, favourable to it."[6]

Indeed, churches have spoken out about candidates well into the 20th century. Many church leaders opposed William Howard Taft because he was a Unitarian (presidential election of 1909).[7] Voting for Al Smith was said by some pastors to

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[4] DAVID BARTON, THE MYTH OF SEPARATION 36 (1991).

[5] Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 48-49 (2003).

[6] Shawn A. Voyles, *Choosing Between Tax-Exempt Status and Freedom of Religion: The Dilemma Facing Politically-Active Churches*, 9 REGENT U. L. REV. 219, 227 (1997) (quoting BARTON, *supra* note 4).

[7] Houck, *supra* note 5, at 49.

be "voting against Christ" (presidential election of 1928).[8] The practice of churches speaking out about candidates is historical and part of our nation's commitment to not having a state-established church, free exercise of religion, and freedom of speech.

Churches have also been at the forefront of most of the dramatic social and political changes in our history.[9] "Churches have played a pivotal role in every important political struggle since (and including) national independence: the abolition of slavery, gambling, child labor, prostitution, temperance, the death penalty, the war in Vietnam, abortion, and civil rights. They will continue to do so because they must."[10] Dean Kelley, in his book entitled, *Why Churches Should Not Pay Taxes*, states:

> Throughout the history of the nation – and long before – churches have been active in helping to shape the public policy of the commonwealth in ways they believed God desired. They were instrumental in setting the stage for the obtaining of independence at its beginning, when the "black regiment" – as James Otis called them – of the dissenting clergy thundered against the tyranny of King George from their pulpits. A few decades later, the churches, acting corporately, brought an end to the practices of dueling by getting prohibitions against it written into the constitutions of twenty-one states, and no one conceived that this activity had any bearing on their

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[8] *Id.*

[9] See Appendix B for examples of sermons where pastors directly addressed important social issues of the day from their pulpits.

[10] Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 923 (2001).

> tax exemption. Churches were active in the effort to abolish slavery (though by the time of the Civil War there were religious apologists *for* slavery in the churches of the South). Churches pressed for laws against gambling, Sabbath-breaking, alcoholic beverages, prostitution, and child labor. They have worked for laws advancing labor organizing, woman suffrage, civil rights, and family welfare.[11]

After the amendment proposed by Lyndon Johnson was enacted into law, churches faced a choice of either continuing the tradition of speaking out regarding political candidates or issues and losing their tax exemption or remaining silent and retaining their tax exemption. Many churches have chosen to remain silent on the issue of political candidates for office.

The IRS, through the years, has interpreted the political speech restriction as absolute and has issued guidance stating that tax exempt entities, including churches, are absolutely prohibited from any activities that constitute political campaign intervention.[12] The IRS strictly defines political campaign intervention as, "any and all activities that favor or oppose one or more candidates for public office."[13] And the IRS has investigated churches throughout the years for political

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[11] DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 87 (1977).

[12] The IRS's most recent guidance states, "Under the Internal Revenue Code, all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. The prohibition applies to all campaigns including campaigns at the federal, state and local level. Violation of this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes." *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations*, FS-2006-17, February 2006, *available at* http://www.irs.gov/newsroom/article/0,,id=154712,00.html.

[13] *Id.*

campaign intervention and even temporarily revoked the tax exempt status of one church for running an advertisement in the *USA Today* opposing Bill Clinton for President.[14]

However, in spite of the IRS' guidance and various enforcement actions since the Johnson amendment was added to § 501(c)(3), the IRS has never imposed punishment for speech a pastor of a church communicates from the pulpit. For example, the IRS recently instituted an election-year Church Tax Inquiry/Examination of All Saints Episcopal Church in Pasadena, California, over a sermon delivered by a guest speaker who maintained that Jesus would not vote for President Bush because of the Iraq War. After the church refused to cooperate with the IRS investigation, the IRS closed the examination without penalizing the church, even though the IRS stated in the closure letter that the sermon constituted direct campaign intervention.[15] ***To date, there is no reported situation where a church lost its tax exempt status or has been punished in any way for sermons delivered from the pulpit addressing political issues***. Nevertheless, the IRS

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[14] *See Branch Ministries v. Rosotti*, 211 F.3d 137 (D.C. Cir. 2000). It is revealing that the *Branch Ministries* court noted that if the Church did not further intervene in political campaigns it could hold itself out as a 510(c)(3) organization and receive the collateral benefits thereof. Essentially all that was lost if the church self-censored its speech would be the advance assurance of deductibility in the event a donor should be audited. *See* I.R.C. § 508(c)(1)(A); Rev. Proc. 82-39 § 2.03; *Branch Ministries,* 211 F.3d 137, 143-43.

[15] The closure letter from the IRS is available at http://www.allsaints-pas.org/site/DocServer/Letter_from_IRS_to_ All_Saints_Church.pdf?docID=2541.

continues to maintain in its published guidance and in its investigations that such sermons violate §501(c)(3)'s restrictions on tax exempt status.

There are no reported incidents where a church has formally challenged the political speech restriction as unconstitutional when applied to sermons preached from the pulpit. Yet, when analyzed in light of constitutional protections afforded to churches, the Internal Revenue Code's restriction on campaign intervention, as applied to pastors' speech from the pulpit, is unconstitutional.

"TEST CASE" STATEMENT OF FACTS[16]

On Sunday, September 21, 2008, Pastor John Jones of the First Baptist Church of Leesville preached a sermon entitled, "How should a Christian vote?" In the sermon, Pastor Jones discussed the Christian view of various moral and political issues such as same-sex "marriage," abortion and religious freedom. Near the end of the sermon, Pastor Jones stated that the Bible contains absolute commands about how Christians should respond to the issues addressed in the sermon and that, for a Christian, the Bible's commands related to abortion, same-sex "marriage," and religious freedom were "non-negotiables" that must be followed by every Christian. The sermon concluded that the Biblical commands related to these issues must be implemented in every area of life and that there was

[16] The following "statement of facts" represents one typical set of "test case" facts which can be developed to challenge §501(c)(3)'s restriction on religious expression that happens to intersect with politics.

no area of life that was somehow "exempted" from the Biblical commands to oppose abortion and same-sex "marriage" and to contend for religious freedom.

The end of the sermon turned to the current political candidates for President of the United States and compared their positions on the issues addressed in the sermon. Pastor Jones used the candidates' own statements and campaign positions to conclude that Barack Obama supported the broadest of abortion "rights," including abortion on demand, and proclaimed the right of same-sex couples to "marry." The only other national party candidate, John McCain, took positions that were not necessarily squarely aligned with Scripture, yet were far less offensive to life and marriage. The sermon stated that Senator Obama's positions so conflicted with Biblical mandates that supporting him would be tantamount to disobeying those commands. Pastor Jones concluded by stating:

> The Bible is crystal clear when it talks about what God believes about abortion. The Bible says God hates hands that shed innocent blood. The Bible is also crystal clear when it states that homosexual conduct is an abomination. There is no middle ground for Christians on these issues. We as Christians cannot name the name of Christ, claim to follow Christ and then support the things He hates. We cannot continue to claim to follow Christ and then give our support to the things He commands that we abhor. Let me be very clear – when you become a follower of Christ, He demands all of your life. Not part of it – all of it. He does not somehow exempt you from His commands when you enter the voting booth any more than He exempts you from His commands at any moment of the day. There is no time when we as Christians can somehow set aside God's commands and follow our own way. Jesus even said, unequivocally, "If you love me, you will keep my commandments," and "He who does not love me does not keep my words...." (John 14:15, 24).

> You have heard our Lord's commands about abortion and same-sex "marriage." You have heard now the positions of the candidates from their own mouths and their own writings. There is no middle ground in this election. If you are a Christian, you cannot support a candidate like Barack Obama for President because he stands opposite of every one of the Biblical mandates we have addressed today. I urge you, when you enter that voting booth, to not vote for Barack Obama or candidates like him that support and encourage activities our Lord condemns in the strongest terms. Our Lord's commands are not optional. Nor can they be taken on and off like a coat we only wear when it is cold outside. Our lives as Christians should be marked by complete and unswerving obedience to our Lord's commands, knowing that He commands us out of love, and we obey Him out of love. When you vote, vote as Christ commands.

The sermon concluded with a prayer asking for God to guide His people as they entered the voting booth in the upcoming election.

The Internal Revenue Service ("IRS"), responding to a complaint about the sermon, sent the church a "Notice of Tax Inquiry" pursuant to 26 U.S.C. § 7611(a). In the Notice of Church Tax Inquiry, the IRS quoted the above sections of Pastor Jones' sermon and asked the Church to respond as to why the sermon did not violate the restriction contained in 26 U.S.C. § 501(c)(3) which requires that non-profit entities not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." The church immediately filed suit claiming that the investigation and threatened penalties as a result of the sermon violated its Constitutional and

statutory rights.[17]

ANALYSIS

I.

THE UNITED STATES CONSTITUTION PROHIBITS TAXATION OF A CHURCH AS A SEPARATE SOVEREIGN.

Churches have been exempted by governments from taxation for time out of mind, for hundreds and perhaps thousands of years. Although early in our history, as well as in English common law history, some unfavored churches were taxed in states with established churches, Justice Brennan straightforwardly admitted the "undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 681 (1970) (Brennan, J. concurring). Nontaxation of churches is undergirded by "more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present." *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971).

Besides churches, under simple logic all nonprofit organizations are legislatively exempted from income taxes. It is not the public benefits that such organizations provide that justifies their exemption, as is often argued; it is their

[17] The standing of the church to file suit immediately upon receipt of a Notice of Church Tax Inquiry under 26 U.S.C. §7611(a) will be addressed in a separate memo.

existence as non-profit entities.[18] Taxation naturally applies to profit-*makers*, the generators of revenue upon which government depends. "Other entities, which are not in the wealth producing category to begin with, do not need to explain why they are not taxed any more than do the birds of the air or the rivers that flow to the sea. . . . [Taxation] would be pointless, since they are not in any meaningful sense producers of wealth."[19] In fact, taxing such nonprofits discourages their existence and amounts to double taxation. First, all citizens, whether or not involved in a church or other nonprofit, are taxed on their individual incomes. "To tax them again for participation in voluntary organizations from which they derive no monetary gain would be 'double taxation' indeed, and would effectively serve to discourage them from devoting time, money, and energy to organizations which contribute to the up building of the fabric of democracy."[20]

Churches and other places of worship are unique, however, among nonprofit entities in their constitutional distinction. "[I]n addition to embodying activities protected by the First Amendment's guarantees of freedom of speech, press, assembly, and petition—as all exempt organizations do—churches also embody the activity protected by the First Amendment's initial clauses, the free exercise of

[18] *Walz*, 397 U.S. at 674; KELLEY, *supra* note 11, at 10; Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285, 1299 (1969).

[19] KELLEY, *supra* note 11, at 10.

[20] *Id.* at 30.

religion and its non-establishment."[21] The "non-establishment" factor is unique to religion; no other First Amendment speaker is protected from government competition. For example, "Congress could set up or subsidize a newspaper, or many of them, to enhance freedom of the press, but it could not set up or subsidize a church."[22]

Churches, therefore, are foundationally different from other nonprofits. "A church is part of a vast movement that encompasses millions of adherents in many lands, that has endured for many centuries and will endure for many more. . . . Unlike public charities, however meritorious, churches mediate, enable, and fulfill a function that is essential to all know human societies and which government cannot effectively provide."[23] The function supplied by churches is providing meaning to human existence. The types of churches, doctrines, and duties may differ greatly, but each offers purpose to life. Without any meaning in life, people increasingly fall into despair, escapism, and addictions and the foundations of civil society are compromised.

The issue involves a distinction between constitutionally separate sovereigns. For one sovereign to tax another ineluctably leaves the taxed entity

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[21] *Id.* at 42.

[22] *Id.* at 43.

[23] *Id.* at 45.

subservient to that authority. *See M'Culloch v. Maryland*, 17 U.S. 316, 429-31 (1819). This is true both in the symbolic statement of paying the tax and in the practical effect of supporting the sovereign party. Therefore, states may not tax each other, and they may not tax property of the federal government. *See, e.g.*, *Van Brocklin v. Tennessee*, 117 U.S. 151, 175 (1886). In addition, Washington, D.C. does not tax the property therein owned by foreign governments, and New York does not tax the property therein owned by the United Nations.[24]

So, too, churches in America are not subservient to the government and are not under any government's sovereignty. The Constitution requires that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I (applied to the states through U.S. Const. amend. XIV). The Constitution prevents the government from wielding its authority to control churches. Churches in this way differ from all other businesses and organizations. They are a unique institution whose existence is not derived from government authority, nor even from governmental acknowledgment. Indeed, churches preceded the birth of our nation, and will remain long after its death. They transcend geographic and ethnic boundaries, as many churches have members and institutions in many nations. While individuals are under the

[24] Glenn Goodwin, Note, *Would Caesar Tax God? The Constitutionality of Governmental Taxation of Churches*, 35 DRAKE L. REV. 383, 392 (1985-86).

sovereign power of their state and federal government, the church as a body is not.[25]

While the church is not subservient to the government, neither is the government subservient to the church. Although government can aid or support virtually all types of social or educational institutions which have a public purpose with the use of tax money, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). Thomas Jefferson coined the highly referenced "wall of separation" between church and state. Separation, however, must be bilateral and reciprocal. Whatever the degree of separation required by the Constitution, it is surely this: that the government may not make the church subservient by taxing its existence. *See Walz*, 397 U.S. at 678 (the "uninterrupted freedom from taxation" has "operated affirmatively to help guarantee the free exercise of all forms of religious belief"). The separation between church and state is designed to restrict the sovereignty of each over the other. It is designed to achieve a position for each that is neither master nor servant of the other. Exemption from income taxation is essential for the respect of the church as a separate sovereign. Otherwise the government has the power to encumber and even terminate churches if such taxes

[25] Of course, the government has power to act even within church institutions in some circumstances, but this is based on its sovereign authority and responsibility over individuals, not over the church's expression of its religious mission. In much the same way, individuals may be taxed on their income, but this should not imply that churches may be so taxed.

are not punctually paid or cannot be so paid in full.[26] "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. . . . Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance." *Murdock v. Commonwealth of Penn.*, 319 U.S. 105, 112 (1943). Indeed, "the power to tax involves the power to destroy." *M'Culloch*, 17 U.S. at 431.

The First Amendment reflects this understanding and the unique role of churches in American society. Separation of government from churches has historically required that churches not be taxed. "Tax exemption is of the very essence of that relationship between government and religion: it neither gives to the organization of religion anything they would not otherwise have nor takes away from them anything they have attracted from adherents on their own merits . . . ."[27] Therefore, under sovereignty principles, the government may not impose income taxes on churches.[28]

The only reported decision addressing tax exemption for a church did not

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[26] *See M'Culloch*, 17 U.S. at 431-32 (describing generally the effect of one sovereign taxing another).

[27] KELLEY, *supra* note 11, at 57.

[28] Tax exemption for churches is much more than mere legislative preference. The legislature has, however, seemingly recognized the separate sovereignty of churches in its structure of the tax code. Churches are the only non-profit entities that are automatically considered exempt without having to apply for an advanced determination of tax exemption from the IRS. *See* I.R.C. § 508(c)(1)(A). All other non-profit entities must apply for an advanced determination of tax exemption before they may hold themselves out to the general public as tax exempt.

address the sovereignty principle. *See Branch Ministries v. Rosotti*, 211 F.3d 137 (D.C. Cir. 2000). In *Branch Ministries*, the church placed a full-page advertisement in the USA Today four days prior to the 1992 presidential election. *Id.* at 139. The ad urged Christians not to vote for presidential candidate Bill Clinton because of his positions on certain moral issues. *Id.* The court in *Branch* Ministries side-stepped the sovereignty issue by stating, "irrespective of whether it was required to do so, the Church applied to the IRS for an advance determination of its tax-exempt status. The IRS granted that recognition and now seeks to withdraw it." *Id.* at 141. Therefore, the court was only addressing a situation where a church had voluntarily applied for and received an advanced determination of tax exemption under which may have allowed the court to side-step the sovereignty issues regarding church tax exemption.

Perhaps more importantly, the court pointed out that it was not dealing with a situation where the church's activities were prescribed by its religious beliefs. The court noted that "the Church does not maintain that a withdrawal from electoral politics would violate its beliefs." *Id.* at 142. Because the church was not engaging in activities that were mandated by its religious beliefs, the court was not faced with a situation where the church was acting within the core of its sovereignty, but rather had crossed the line into activities that, in the church's own estimation, fell outside its sovereignty. This fact, coupled with the fact that the

court was only dealing with an advanced determination of tax exemption[29] leads to the conclusion that *Branch Ministries* does not negate the sovereignty principle discussed above. However, even if *Branch Ministries* can be read to reject the sovereignty principle, such a reading is inconsistent with the Constitution and must be rejected. Respecting the sovereignty of churches by exempting them from taxation is the only course faithful to our constitutional structure and to the continuance of religious freedom. Breaching the "wall of sovereignty" has unfavorable consequences to both government and religion.

Some types of taxes and service charges may lawfully be required of churches under the Constitution. "There are conceivably various expenditures by churches that are not essential to the free exercise of religion, such as speculative investments, which might be subject to taxation just as income from trade or business unrelated to the exempt function of a church now is." *See* KELLEY, *supra* note 11, at 94. Exemption is not constitutionally mandated where there is truly "income" or where there is no religious purpose. For example, sales of materials, accessories, and the like are taxable since they were sold for a commercial purpose. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization of California*, 493

[29] While bona fide churches are automatically exempt under § 508(c)(1)(A), the question remains whether bona fide churches that have not sought IRS recognition are subject to a tax inquiry under CAPA regarding the § 501(c)(3) restriction. Although the *Branch Ministries* court was skeptical that such churches were outside of the power of CAPA and § 501(c)(3), *Branch Ministries*, 211 F.3d at 141, its skepticism is contrary to the history and logic of church tax exemptions.

U.S. 378 (1990). Also, undeveloped land (after a grace period for development) owned by a church is taxable, since it is not being used for religious purposes. In addition, churches may be billed for municipal services that they enjoy. While churches cannot be taxed for governmental projects generally, any nonprofit's collective activities should not impose an additional burden on taxpayers. Churches "should pay the actual cost of any municipal services they need and use (and which would otherwise not be necessary.)" *Id.* at 96. "But genuine service charges are entirely different from paying a proportion of the whole municipal budget, which is not significantly increased by the presence of churches, and indeed might be greater if they were *not* there." *Id.* at 96-97.

Because the church is a separate sovereign not subject to taxation, the sermon delivered from the pulpit urging church members to oppose a candidate for office does not result in a removal of tax exemption or the imposition of tax penalties.

II.

TAXING SPEECH FROM THE PULPIT VIOLATES THE FIRST AMENDMENT.

Federal law restricting a pastor's speech from the pulpit that endorses or opposes a candidate violates the First Amendment. The Internal Revenue Code's prohibition on religious speech that intersects with politics violates the Establishment Clause because it excessively entangles government with religion

and has an unconstitutional purpose to inhibit religion. The prohibition also violates the free exercise of religion as express discrimination of religious speech. Finally, the prohibition is content-based and impermissibly conditions exemption on the surrender of the fundamental rights of free speech and free exercise of religion.

A. Taxing Speech From The Pulpit Violates The Establishment Clause.

The Supreme Court held in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), that, to satisfy the Establishment Clause, a government activity involving religion must have a secular purpose, must neither primarily advance nor inhibit religion, and must not foster excessive entanglement with religion. While many members of the Supreme Court have complained of the *Lemon* test and have advocated its rejection,[30] it remains the test most often used by the Supreme Court in Establishment Clause cases and was reaffirmed recently by the Supreme Court.

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[30] *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting)(stating that *Lemon* has a "checkered history"); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting from denial of certiorari) (stating that the Court should grant *certiorari* to "inter the *Lemon* test"); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting) (calling *Lemon* "meaningless"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring)(stating that *Lemon* "stalks our Establishment Clause jurisprudence"); *Wallace v. Jaffree,* 472 U.S. 38, 67 (1985) (O'Connor, J., concurring) (stating that *Lemon* "should be reexamined and refined"); *Id.* at 91 (White, J., dissenting); *Id.* at 110-11 (Rehnquist, J., dissenting) (stating that *Lemon* has spawned "unworkable plurality opinions," "consistent unpredictability" and "unprincipled results"); *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (requires "sisyphean task" to apply the test).

See McCreary County v. ACLU, 545 U.S. 844 (2005) (using *Lemon* to hold a display of the Ten Commandments unconstitutional.[31] Whatever the future of *Lemon*, it remains the test to be used under the Establishment Clause. The political speech restriction in §501(c)(3) fails all three prongs of the *Lemon* test.

1. Taxing Speech From The Pulpit Excessively Entangles Government With Religion.

The government becomes excessively entangled with religion if its agents monitor sermons to discern whether they are too "political" or not "religious" enough to escape the Johnson amendment. It's not just a matter of listening for specific endorsements—agents would have to weigh speech about moral and social issues as well, lest there be some indirect form of endorsement or condemnation of a candidate. Indeed, under this prong of the *Lemon* test, the Court considers "all the circumstances of a particular relationship" between church and government. *Lemon*, 403 U.S. at 614.

In general, the Supreme Court has given support to the argument that taxing churches leads to improper, excessive entanglement. *See Walz v. Tax Commission of New York*, 397 U.S. 664 (1970). The Court, in discussing the difference between taxing churches and granting them a tax exemption stated:

Either course, taxation of churches or exemption, occasions some

[31] *But see Van Orden v. Perry*, 545 U.S. 677 (2005), which upheld against an Establishment Clause challenge a display of the Ten Commandments, and was decided on the same day as *McCreary*, but did not use the *Lemon* test.

> degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
>
> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

Walz, 397 U.S. at 674-75. While not explicitly holding that denial of a tax exemption creates excessive entanglement, the Court did acknowledge the problems with taxing churches and the ongoing involvement of the state in religious matters created by such a relationship. Taxation "oblige[s] the government to examine, inspect, evaluate, compare, audit, standardize, regulate, or control" churches.[32] These processes will "mandate a close and continuing governmental surveillance of churches."[33] In a very practical way, taxing church resources would make religion an object of legislation and create messy impacts between church and state, such as the foreclosing of religious activity for inability to pay proscribed taxes. Exemption keeps the government neutral concerning religion "without interference." *Walz*, 397 U.S. at 669. And importantly, this

[32] KELLEY, *supra* note 11, at 32.

[33] Goodwin, *supra* note 24, at 397.

ongoing, invasive surveillance is triggered by the government engaging in an even more offensive behavior: monitoring, analyzing, and deciding the religiosity of church speech.[34]

Application of the Internal Revenue Code restriction requires that government agents continuously monitor churches for violations. Even if the IRS responds only to private watchdogs that report churches to the IRS for alleged electioneering, government agents must then monitor the church and its activities. As one commentator pointed out:

> If courts were permitted to distinguish political from religious speech, then "prophylactic contact [would be] required to insure" that church leaders played a strictly religious role. A church leader cannot be monitored once so as to ascertain the extent of political campaigning which may appear in the leader's sermons. Attendance at multiple church meetings by I.R.S. agents would be necessary to effectively enforce the ban on political campaigning. The I.R.S. must not be allowed "to engage in onerous, direct oversight, to make on-sight judgments from time to time" as to whether parts of a sermon constitute political campaign activities. "A comprehensive system of supervision would inevitably lead to an unconstitutional

[34] Another important point to realize is that any church "income" to be taxed is not really income at all. Income is money which increases the wealth of persons. The money given to churches by contributors is gift-money given as church resources, and it does not make any person(s) wealthy. Income tax "focuses on net income accruing to the benefit of private individuals," not the resources of church body. *See* KELLEY, *supra* note 11, at 15. Even income of corporations benefits the individual shareholders. Because of this and other differences, taxing church income presents many unanticipated and complex questions of calculating net income and deductions. *See* Bittker, *supra* note 18, at 1289-90 (showing the various problems in determining net income and applicable deductions for a simple hypothetical church, and finding that "the church's 'net income' or 'loss' is one of about a dozen different amounts") "[T]he very concept of [a church's] 'taxable income' . . . is an exotic subject, more suited to academic speculation than to practical administration." *Id.* at 1299.

administrative entanglement between church and state."[35]

This necessary monitoring fosters excessive entanglement.

More importantly, in their investigations, government agents must analyze the differences between religious speech and religious speech which constitutes electioneering. The IRS analyzes each situation on "all the facts and circumstances" and thus has "very broad discretion . . . without clear definitions or intelligible principles" to aid the inquiry.[36] "An examination of these rulings and statements highlights the vague and inconsistent standards that have resulted from the Service's attempts to reconcile the statutory language with the pragmatic realities of churches . . . ."[37] For example, the IRS vacillates on whether it is a church's "effort" (the intent to influence an election) or "effect" (an actual influencing of an election) that matters under the Code.[38] "Does an organization's intent bear on whether its activity breaches the prohibition? Yes, ruled the Service in 1972 . . . . No, asserted the [IRS General] Counsel in 1979 . . . ."[39] In fact, the law has been so unsettled that churches have long been unable to discern the true

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[35] Scott W. Putney, *The IRC's Prohibition of Political Campaigning by Churches and the Establishment Clause*, 64 FLA. B.J. 27, 30 (May 1990) (citations omitted).

[36] Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 241-42 (1992).

[37] *Id.* at 238.

[38] *Id.* at 242-43.

[39] *Id.* at 242.

boundaries of permissible speech.[40]

It is precisely the vagaries of the standard and the difficulties (if not impossibilities) in discerning religious from political speech that creates excessive entanglement. In *Lemon*, the Supreme Court invalidated a state program that provided assistance, including teacher salary supplements, to parochial schools on the ground that it excessively entangled government with religion. *Lemon*, 403 U.S. at 613-14. Even though the aid was supposed to be limited to secular subjects, the Court was concerned with government agents tasked with separating secular from sectarian instruction, and stated that such an arrangement required "comprehensive, discriminating and continuing state surveillance." *Id.* at 619. The Court was especially concerned with a provision of the law that allowed the government to inspect the financial records of the school to determine whether expenditures were religious or secular. *Id.* at 621-22. As in *Lemon*, were the IRS to attempt to discern between religious and political speech, it would find itself excessively entangled in matters of religion.

According to the Supreme Court, the line between discussion of issues and discussion of candidates is illusory in practice, thus leading to additional problems in differentiating between speech that is permissible under the I.R.C. and that

[40] W. Peter Burns, Note, *Constitutional Aspects of Church Taxation*, 9 COLUM. J.L. & SOC. PROBS. 646, 680 (1973).

which violates the Code. In *Buckley v. Valeo*, 424 U.S. 1, 39 (1976), the Court reviewed the constitutionality of several provisions of the Federal Election Campaign Act, including one that placed a dollar ceiling on the annual expenditures most entities were permitted to make "relative to a clearly identified candidate . . . advocating the election or defeat of such candidate." Upon striking down the provision, the Court observed that the "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42; *see Thomas v. Collins*, 323 U.S. 516, 535 (1945).

> Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.

Buckley, 424 U.S. at 43 n.50 (quoting *Buckley v. Valeo*, 519 F.2d 821, 875 (D.C. Cir. 1975)).

A federal district court applied the same principle in *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997). In that case, the court held that the Department of Defense could not prohibit military chaplains from urging parishioners to join a postcard campaign calling for the override of President Clinton's veto of the partial-birth abortion ban. *Id.* at 152. While the government argued that the chaplains' speech "is really 'political,' not religious," the court rejected that

distinction. *Id.* at 164.

> The defendants, however, provide no basis for the Court in this case to distinguish the political from the religious. For example, [plaintiff's] desire to urge his Catholic parishioners to contact Congress on legislation that would limit what he and many other Catholics believe to be an immoral practice—partial birth abortion—is no less religious in character than telling parishioners that it is their Catholic duty to protect every potential human life by not having abortions and by encouraging others to follow suit. Writing to Congress is but one way in which Catholics can fulfill this duty, and it coincidentally involves communicating with the political branches of government.

Id. The court stated that even if it labeled the speech *political*, "it is not the role of this Court to draw fine distinctions between degrees of religious speech and to hold that religious speech is protected but religious speech with so-called political overtones is not." *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263, 270 n.7 (1981)).

Innumerable other issues similarly impact religion and politics, including terrorism, civil rights, environmental concerns, foreign policy, capital punishment, and welfare concerns.[41]

> The Catholic Church has opposed abortion since the time of the Caesars. The abortion issue was religious long before it became political. Since the *Roe v. Wade* decision, candidates for public office have been frequently aligned with either the pro-life or pro-choice movements. Party platforms have contained references to abortion. Therefore, it is not the Catholic Church which endorses candidates; rather, the candidates endorse the longer-held view of the Roman Catholic Church. Removal of tax-exempt status would violate the

[41] "Those who say that religion has nothing to do with politics do not know what religion means." MOHANDAS K. GANDHI, THE WORDS OF GHANDI 76 (Richard Attenborough ed. 1982) (quoted in Richard Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 771 (2001)).

> requisite government neutrality toward religion and would operate as a condemnation of Catholic Church dogma.[42]

The pervasive monitoring of churches and religious speech required by enforcing the I.R.C.'s prohibition to speech from the pulpit creates onerous, direct, pervasive and excessive entanglement of the state with religion.

The prohibition also requires intense governmental review of church financial records. Congress has already recognized its limited role in such matters by placing restrictions on what records of churches are subject to inspection by the IRS. *See* I.R.C. § 7611 (limiting inquiries into church financial records to determinations of tax exempt status and unrelated trade, business, or other activities subject to taxation). When government agents decide that a violation has occurred, they must then consider the magnitude of the violation in order to ascertain the proper amount for taxation and to ascertain whether the violation should justify the complete loss of tax exempt status. Thus, government supervision is ongoing, administratively difficult, and financially involved. When added to the entanglements of religious versus political speech described above, such a "comprehensive system of supervision . . . would inevitably lead to an unconstitutional administrative entanglement between church and state." *Aguilar v. Felton*, 473 U.S. 402, 410 (1985).

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[42] Putney, *supra* note 35, at 30.

The Supreme Court's decision in *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990) does not stand for the proposition that enforcement of the I.R.C. prohibition does not constitute excessive entanglement. In that case, the Court upheld the imposition of a sales and use tax to the sale of religious materials. The Court recognized that the tax imposed some administrative burden on the ministry, but also held that the burden did not rise to "a constitutionally significant level." *Id.* at 394. Important to its holding was the fact that the imposition of the tax did not require the state to examine sales and uses to determine which were religious and which were not. *Id.* The Court stated that "routine regulatory interaction which involves no inquiries into religious doctrine, ... no delegation of state power to a religious body, ... and no 'detailed monitoring and close administrative contact' between secular and religious bodies, ... does not of itself violate the nonentanglement command." *Id.* at 394-95 (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989)). The *Jimmy Swaggart* case would have been decided differently and would have found excessive entanglement had the imposition of the tax required close monitoring or required a decision to be made between religious and political speech.

2. Taxing Speech From The Pulpit Does Not Have A Valid, Secular Purpose.

Under the secular purpose prong of the *Lemon* inquiry, "although a legislature's stated reasons will generally get deference, the secular purpose

required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary County*, 545 U.S. at 864 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). The purpose test has a "straightforward nature," that looks solely to "openly available data," "readily discoverable fact," or "traditional external signs" such as the "text, legislative history, and *implementation of the statute, or comparable official act.*" *Id.* at 862-63 (emphasis added). The test is to be conducted by the court "without any judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862. There is little legislative history to determine the purpose of § 501(c)(3)'s prohibition on endorsing or opposing candidates and the legislative history demonstrates that there was no stated purpose of the amendment at the time of its adoption. However, implementation of the prohibition to speech from the pulpit has no valid secular purpose.

The actual impact of the restriction is in great tension with constitutional principles. Surely, the suppression of religious speech by church leaders from the pulpit cannot be considered a legitimate secular purpose.[43] "[P]reaching from the pulpits" occupies a "high estate under the First Amendment." *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 161 (2002). There can be no valid, secular purpose for taxing speech that constitutes core,

[43] Putney, *supra* note 35, at 28.

religious expression and that occupies such a high estate under the First Amendment. The pastor's sermon at issue in this case was religious expression at its most concrete. The implementation of the restriction against such speech has the purpose of stifling core religious exercise. Such implementation does not constitute a secular purpose.

When viewing the circumstances at the time of the adoption, there is some indication that the purpose of the restriction was not to inhibit churches. Scholarly consensus indicates that then-senator Lyndon B. Johnson requested the amendment in 1954 in order to restrict a private foundation in Texas that was supporting his opponent.[44] Some scholars contend that Johnson, even though he intended to restrict private foundations opposing his candidacy for the Senate, never intended the speech restriction to apply to churches.[45] In personal correspondence with one commentator, George Reedy, Johnson's chief aide in 1954 stated that he is "confident that Johnson would never have sought restrictions on religious

[44] *See, e.g.*, Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 740-768 (2001); Deidre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 106-108 (1998).

[45] *See* Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code, and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J. L. & POL. 41, 70 (2007) (citing O'Daniel, *supra* note 44, at 768).

organizations...."[46] However limited Johnson may have meant the restriction to be, the implementation of the restriction against speech from the pulpit directly applies the restriction to churches and directly inhibits religious exercise.

It was not until 30 years after the 1954 amendment that Congress finally tried to give a reason for its purpose in passing the political speech restriction. In 1987, Congress indicated that the legislative motive for the ban is for the "U.S. Treasury to remain neutral in political affairs." H. R. Rep. No. 391, 100th Cong. 1st Sess. 1621, 1625 (1987), U.S.C.C.A.N. 1987, pp. 2313-1, 2313-1201, 2313-1205. Courts, however, will not consider legislative statements made well after the passage of a bill. *United States v. Price*, 361 U.S. 304, 313 (1960).

In *Price*, the Supreme Court, in 1960, considered a 1926 tax code provision related to deficiency assessments. The 1926 provision was reenacted in the 1939 and 1954 tax codes. *See id.* at 308-13. When determining the purpose of the early provision, the Court was unwilling to rely on the statement of the 1954 Congress regarding the purpose of the law. *See id.* at 313 (stating that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). Congress's statement in 1987, therefore, cannot provide the purpose for the 1954 campaigning prohibition amendment.

Even if considered, however, Congress's "interest," expressed some thirty

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[46] James D. Davidson, *Why Churches Cannot Endorse or Oppose Political Candidates*, 40 REV. RELIGIOUS RESEARCH 16, 18 (Sept. 1998).

years after the fact is entirely make-weight. The rationale that the Treasury is to "remain neutral" is belied by the fact that it "is involved in political activity up to its eyeballs, starting with exemptions for PACs. It also frees up veteran's organizations, and only veteran's organizations, for unlimited lobbying."[47] Numerous organizations exempt from the payment of federal income tax under subsections of § 501 other than § 501(c)(3) may engage in unlimited amounts of campaign activity without jeopardizing their tax exempt status. *E.g.*, I.R.C. § 501(c)(5) (exempting labor, agricultural, and horticultural organizations; I.R.C. § 501(c)(6) (exempting business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues). Congress's choice to exempt from taxation virtually all the income of organizations created specifically to raise money for and carry out election campaigns, *see* I.R.C. § 527, further underscores the incongruity of conditioning the exemption for churches on complete silence on the worthiness of candidates.

> [T]o accept [Congress's] argument one has to accept two distinct propositions. First, that tax exemption is a *direct* subsidy of whatever is said by a pastor. And second, that the Treasury *ab initio* endorses everything that is said from the pulpit by reason of tax exempt status. Those two unsupported logical leaps ignore "the critical difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Preachers have attacked political candidates' morality since the inception of our

[47] Houck, *supra* note 5, at 83.

> country . . . and by allowing this religious speech now the Government is neither breaching its neutrality, nor endorsing it.[48]

Furthermore, Congress's premise is wrong. The theory that exempting churches which engage in political speech somehow "subsidizes" political activity turns on a "tax exemption" being the same as a direct payment to the church. Exemptions and subsides, however, are very different things.[49] The Court recognized this in *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970):

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. . . .
>
> The government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state . . . .

Id. at 675. Additionally, scholars have noted at least six major differences between subsidies and tax exemptions:

1. In a tax exemption, *no money changes hands* between government and the organization. There is no financial transaction with applications, checks, warrants, vouchers, receipts, accounting, or audits; ". . . government does not transfer part of its revenue. . . ."
2. A tax exemption, in and of itself, *does not provide one cent* to an

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[48] Voyles, *supra* note 6, at 241 (quoting plaintiff's memo and *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995)).

[49] See Edward Zelinsky, *Are Tax "Benefits" for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 825 (2001) and Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 260-61 (1969) for an exhaustive treatment of the subject.

organization. Without contributions from its supporters, it has nothing to spend. Government cannot create or sustain—by tax exemption—any organization which does not attract contributions on its own merits.

3. The *amount* of a subsidy is determined by the legislature or an administrator; there is no "amount" involved in a tax exemption because it is "open-ended"; the organization's income is dependent solely on the generosity of its several contributors, each of whom decides freely and individually how much he or she will give.
4. Consequently, there is *no period legislative or administrative struggle* to obtain, renew, maintain, or increase the amount, as would be the case with a subsidy; political allegiances are not mobilized to support or oppose it; the energies of the organization are not expended in applying for, defending, reporting, qualifying, undergoing audits and evaluations, etc., and the resources of government are not expended in administering them.
5. A subsidy is not *voluntary* in the same sense that tax-exempt contributions are. When the legislature taxes the citizenry and appropriates a portion of the revenues as a subsidy to an organization, the individual citizen has nothing determinative to say as to the amount of the subsidy or the selection of the recipient. (Citizens may testify at hearings on such matters and even bring about the defeat of legislators with whom they disagree, but that does not make their "contribution" to the subsidized organization at the time any less compulsory.)
6. A tax exemption does not convert the organization into an agency of "state action," whereas a subsidy—in certain circumstances—may.[50]

The more relevant question is to ask how the government defines an appropriate tax base. Charitable nonprofits, whether secular or religious, are most properly considered outside the general tax base.[51] Notably, churches alone are

[50] KELLEY, *supra* note 11, at 33-34. Professor Boris Bittker gives examples to clarify these differences. *See* Bittker, supra note 18, at 1303.

[51] KELLEY, *supra* note 11, at 10.

singled out for automatic exemption. *See* I.R.C. § 508(c)(1)(A). Aside from the constitutional boundaries against taxing churches, excluding nonprofits, and especially churches, from the tax base is valid policy choice of the legislative branch. The courts are not fit to decide policy matters vested in the legislature. "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976).

Some cases have tended to blur the line between exemption from taxation and direct subsidies. *See e.g., Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983) (stating that an exemption "has much the same effect as a cash grant to the organization of the amount of tax it would have to pay"). However, the *Walz* distinction is a reasoned, coherent standard that governs the issue. Even the *Regan* Court noted that exemptions and subsidies are not alike "in all respects." *Id.* at 544 n.5. A single similar effect does not make them equivalent, and this argument does not make legitimate Congress's restriction on the political expression of pastors.

3. The Primary Effect Of Taxing Speech From The Pulpit Is The Inhibition Of Religion.

Enforcing § 501(c)(3)'s prohibition to speech from the pulpit has the primary effect of inhibiting religion. When enforced, or from the chill of potential

enforcement, § 501(c)(3) effectively muzzles religious speech of churches and pastors. Religion offers a unique perspective on political issues, such as which candidates are good or bad for society. Yet pastors are uniquely disabled from commenting on only one segment of our society (i.e., politicians) at the one time it might actually matter to politicians—election time. Pastors can urge moral action against almost any figure—movie actor, abortionist, homosexual activist, etc.—but the IRS grants politicians a "get out of moral scrutiny free" card at each election. The restriction forces churches to self-censor their speech so as to prevent endorsement of issues from being transformed into endorsement of political candidates. The only way a pastor may truly safeguard against these misapprehensions is to purge his sermons of content that may seem too political, even when the content is deeply theological and explicates core religious tenets. The gray area where religion and politics overlap must be abandoned.

Fear of potential liability, however, may not be used by the government to "affect the way an organization carrie[s] out what it underst[ands] to be its religious mission." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). And tax exemptions may not be conditioned if the requirements "so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). Religion is inhibited when church leaders, at the risk of losing their church's tax exempt

status, self-censor sermons that they fear the IRS may consider to endorse or oppose a candidate. The effect is the impermissible effect of promoting secular views at the expense of religious views. *See Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (silencing religious views has the impermissible effect of promoting only secular views).

B. Taxing Speech From The Pulpit Violates The Free Speech Clause.

Application of I.R.C. § 501(c)(3)'s restriction to speech from the pulpit is an unconstitutional content-based discrimination on speech and it imposes unconstitutional conditions on free speech.

1. The Restriction Is An Unconstitutional Content-Based Restriction on Speech.

As applied, the I.R.C. restriction contained in § 501(c)(3) is an unconstitutional content-based restriction on speech. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 828 (1995). Such discrimination is "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and the government bears the burden of strict scrutiny to justify a content-based restriction. *See Simon & Schuster, Inc., v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117-18 (1991). Stressing its disdain for content-based prohibitions, the Supreme Court has stated:

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content. [citations omitted]... The essence of this forbidden censorship [sic] is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open [sic]."

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1963)). Content-based regulations of speech constitute "censorship in a most odious form." *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J. concurring).

"The principal inquiry in determining content neutrality is whether the government has regulated speech without reference to its content." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 754 (1994) (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Therefore, if, in the regulation of speech, the government references the content of the speech, then the regulation of the speech will be considered a content-based regulation. A church need not prove an "improper censorial motive" in the Code's ban on certain speech. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

In *Arkansas Writers' Project*, the Supreme Court invalidated a sales tax scheme as content-based. Arkansas' sales tax scheme taxed general interest magazines, but exempted newspapers and religious, professional, trade and sports journals. *Id.* at 223. The Court stated that the sales tax scheme treated some

magazines less favorably than others, and was especially concerned that "a magazine's tax status depends entirely on its *content*." *Id.* at 229 (emphasis in original). The Court noted that, "In order to determine whether a magazine is subject to sales tax, Arkansas' 'enforcement authorities must necessarily examine the content of the message that is conveyed.' Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment[]...." *Id.* at 239 (*quoting FCC v. League of Women Voters of California*, 468 U.S. 364, 383 (1984)).

In *Leathers v. Medlock*, 499 U.S. 439 (1991), a case upholding a sales tax on cable television providers, the Court reviewed its jurisprudence regarding First Amendment challenges to tax schemes and concluded, "These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.... Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech." *Id.* at 447 (discussing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (invalidating tax on selected newspaper publishers); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (invalidating tax that targeted selected publishers); *Arakansas Writers' Project*, 481 U.S. at 221)). The Court explained:

> The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from content-based regulation: It will distort the market for ideas. "The constitutional right of free expression is ... intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us ... in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

Id. at 448-49 (*quoting Cohen v. California*, 403 U.S. 15, 24 (1971)).

While the Internal Revenue Code § 501(c)(3)'s restriction deals with a tax exemption instead of the imposition of a tax, the principles are the same. It is impossible to apply the restriction without referencing the content of the speech involved. Those churches who do not speak from the pulpit endorsing or opposing political candidates for office will receive the tax exemption, while those churches who speak from the pulpit in endorsing or opposing political candidates for office will not receive the exemption. Nor can the IRS possibly enforce § 501(c)(3) without referencing the content of the speech that is being uttered by the church. The speech ban "targets a narrow subset of core political speech, and thereby insulates some of the most visible and powerful public figures from criticism."[52] The end result of the imposition of § 501(c)(3) to speech from the pulpit is that a select few speakers will be taxed solely based on the content of their speech,

[52] Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 887-88 (2001).

thereby effectively silencing their speech and driving it from the marketplace of ideas. Thus, as with any other content-based speech restriction, the government's restriction must be justified by a compelling governmental interest that is advanced in the least restrictive means. *Widmar v. Vincent*, 454 U.S. 263, 277-78 (1983).

The government does not have a compelling interest sufficient to justify this content-based restriction on speech. The IRS may attempt to argue that the speech restriction is necessary for the "U.S. Treasury to remain neutral in political affairs." H. R. Rep. No. 391, 100th Cong. 1st Sess. 1621, 1625 (1987), U.S.C.C.A.N. 1987, pp. 2313-1, 2313-1201, 2313-1205. However, such an interest is not legitimate given the involvement of the Treasury in political affairs in other contexts. "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). The interest of the government in remaining neutral in political affairs cannot be compelling given the fact that the interest is not applied uniformly against other similar conduct that produces the same harm to the interest as does the restriction in § 501(c)(3). Put another way, the government cannot seriously claim a compelling interest to remain neutral in political affairs through its tax exemptions while it simultaneously exempts entities that are inherently

political in nature.

There is no compelling reason to tax a nonprofit entity that is not a producer of wealth, and still less reason to tax churches, which enjoy specific protections from governmental regulation and interference. *See* U.S. Const. amend I; *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (barring excessive entanglement). The district court in *Branch Ministries* argued for a compelling interest in "maintaining the integrity of the tax system and in not subsidizing partisan political activity." *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 25 (D.D.C. 1999) (citing *Hernandez v. Commissioner*, 490 U.S. 680 (1989) and *Christian Echoes National Ministry v. U.S.*, 470 F.2d 849 (10th Cir. 1972)). However, granting a tax exemption is not akin to subsidizing the speech that occurs. Subsidies, properly understood under the precedent of *Walz*, are not even involved. *See* 397 U.S. at 675. As discussed above, exemption from taxation simply does not carry the same governmental imprimatur as a subsidy.

The government cannot argue that a compelling interest in this case is avoiding an Establishment Clause violation because the Supreme Court has already ruled that granting a tax exemption to churches does not violate the Establishment Clause. *See Walz*, 397 U.S. 664. Further, "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise

Clauses protect." *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990). Granting a tax exemption for private religious speech does not in any way violate the Establishment Clause because private speech that in no way is associated with the government cannot violate the Establishment Clause.

In short, there is no compelling reason sufficient to justify the content-based restriction on speech in § 501(c)(3). Even if the government could enunciate a compelling interest, the interest it has is in no way advanced in the least restrictive means. If the government's interest in enforcing § 501(c)(3) is in remaining neutral in political affairs, then granting the tax exemption uniformly without reference to political speech advances that interest without in any way damaging the right to free speech. If the interest of the government is in avoiding an Establishment Clause violation, then remaining neutral in matters of religion and not classifying religious speech on the basis of its content advances that interest in the narrowest way.

Moreover, removing a church's tax exempt status is an overly restrictive means of advancing a state interest. If the integrity of the tax system is threatened by fraud, for example, then instead of restricting the free exercise and speech rights of pastors the government should refine its fraud regulations. At the very least, if the government's interest in not subsidizing political activity is the concern, then the government's remedy should be proportionate to the political activity. For

example, in *Branch Ministries*, 211 F.3d 137, the IRS acknowledged that there were three ways to enforce § 501(c)(3)'s ban on speech: "(1) a 10% tax on the [amount paid for the newspaper advertisement], pursuant to I.R.C. § 4955 (26 U.S.C.); (2) an injunction against further partisan political activity, pursuant to I.R.C. § 7409 (26 U.S.C.); (3) and/or revocation."[53] Revocation of tax exemption is a harsh penalty, disproportionate to the monetary costs of religious speech of a pastor from the pulpit. Congressional records recognize this, indicating that "the Internal Revenue Service may hesitate to revoke the exempt status of a charitable organization for engaging in political campaign activities in circumstances where that penalty may seem disproportionate."[54]

Despite the IRS' argument that an imposition of an excise tax or an injunction is a narrow way to advance its interests, even these "lesser" penalties are fatally problematic. For example, were there some real harm to the electoral system from churches secretly coordinating campaign messages, that harm is properly dealt with by election laws that specifically target improper coordination, not by a broad, chilling ban on all political speech from the pulpit. Thus, even a "less restrictive IRS measure" to enforce the broad ban will violate the church's constitutional rights.

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[53] Voyles, *supra* note 6, at 242 (citing Def. Summary Judgment Motion 44).

[54] *Id.* at 243 (emphasis omitted) (quoting H.R. REP. No. 100-391 (II)).

2. *The Restriction Imposes Unconstitutional Conditions On Free Speech.*

Section 501(c)(3)'s ban on speech from the pulpit imposes unconstitutional conditions on the exercise of the right to free speech and is therefore unconstitutional.

The Supreme Court's unconstitutional conditions doctrine essentially states that "the Government cannot accomplish indirectly - through conditioning the allocation of benefits such as employment or tax subsidies - that which it is barred from doing directly."[55] The Court applied the unconstitutional condition doctrine in the context of conditions on tax exemptions in *Speiser v. Randall*, 357 U.S. 513 (1958), and its companion case of *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958). In *Speiser*, 357 U.S. at 515-18, the Court held that a state could not require veterans to sign a loyalty oath in order to claim the benefits of a special exemption for veterans from the state property tax. The veterans claimed that once the state granted them a privilege, it could not condition that privilege on surrendering free speech rights. The Court stated, "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." *Id.* at 518. The Court struck down the law and stated:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent

[55] Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL'Y 460 (1995).

> effect is the same as if the State were to fine them for this speech.... [T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.

Id. at 518-19.

Likewise, in *First Unitarian Church*, 317 U.S. at 546-47, the Court held that forcing a church to sign a loyalty oath in order to claim the exemption for properties used for exclusively religious purposes was unconstitutional. *Speiser* and *First Unitarian* stand for the proposition that the government may not condition a tax exemption on the surrender of free speech rights. Put differently, because the government cannot directly pass a law prohibiting churches from endorsing or opposing political candidates for office because of the obvious free speech implications regarding such a law, the government cannot likewise condition the receipt of a tax exemption on refraining from such speech. Just as the loyalty oath did in *Speiser* and *First Unitarian*, the tax exemption restriction in § 501(c)(3) has the effect of coercing churches to refrain from speech touching on political candidates even if the speech explicates core religious doctrines. There is no constitutional difference between § 501(c)(3)'s restriction and penalizing churches directly for engaging in speech that happens to be political.

The Court in *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983), rejected the unconstitutional condition argument where a public interest organization claimed that § 501(c)(3)'s substantial lobbying provision was

unconstitutional because it imposed unconstitutional conditions on the receipt of tax exemptions. The organization sought to engage in substantial lobbying and to receive a tax exemption. However, the Court rejected the unconstitutional conditions argument because the lobbying regulation was content-neutral and noted that the case would be different if Congress were to discriminate in such a way as to "aim at the suppression of dangerous ideas." *Id.* at 548; *see also Rosenberger*, 515 U.S. at 834 ("*Regan* relied on a distinction based on preferential treatment of certain speakers—veteran's organizations—and *not* on a distinction based on the content or messages of those groups' speech") (emphasis added). The IRS restriction here, however, is undeniably content-based, thereby rendering *Regan* inapplicable.

Regan also relied heavily on the view that a tax exemption to organizations that did not substantially lobby meant only that "Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non profit organizations undertake to promote the public welfare." 461 U.S. at 544. *Regan's* treatment of a tax exemption as equivalent to a direct subsidy is in tension with *Walz's* opinion distinguishing between exemptions. It also ignores the factual and logical distinctions between exemptions and subsidies. The Court has not resolved this tension other than to acknowledge in *Regan* that exemptions and subsidies are not "in all respects identical." *Id.* at 544 n.5 (citing *Walz*, 397 U.S. at 674-76).

Despite this tension, there is a qualitative difference between the lobbying activities the organization in *Regan* wished to engage in and the speech from the pulpit in this case. Granting an exemption for speech from the pulpit does not in any way equate to a subsidy of the speech. Nor could the two equate given the Constitutional mandate that the government remain neutral in matters of religion. The state does not subsidize everything that it permits without taxation. If it were true that the government, by exempting speech from the pulpit from taxation, was in effect subsidizing the speech, the government would certainly run afoul of the Establishment Clause. *Regan's* equivalence of subsidies and exemptions has never been applied to core religious speech from the pulpit and, if it were, the argument would necessarily fall given the Constitutional mandate on the government to remain neutral toward religion. Indeed, the Court in *Walz* noted this distinction:

> General subsidies of religious activities would, of course, constitute impermissible state involvement with religion.
>
> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, "(i)n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches," while "(i)n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." Thus, "the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support

> the state; by the same token the state is not expected to support the church." Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy.

Walz, 397 U.S. at 690 (*quoting* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, pt. II*, 81 Harv. L. Rev. 513, 553 (1968); Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1687 n.16 (1969)). When applied to core religious expression, there can be no equivalence between an exemption and a subsidy.

Finally, *Regan* is also distinguishable in that it did not involve speech by an individual pastor to his congregation, but rather substantial lobbying by an organization. The same is true of the Tenth Circuit decision *Christian Echoes National Ministry v. U.S.*, 470 F.2d 849 (10th Cir. 1972) (religious organization involved in continuous and substantial lobbying). While an argument might be made that substantial lobbying may transform an organization into a political entity (thus no serious argument could be made that the entity was a church), a pastor's sermon to his congregation that includes religious commentary for or against a candidate would not. The activity involves no extra church expenditures and no time except a few minutes—or even seconds—and the penalty imposed on the church would be grossly disproportionate to the pastor's actual speech activity.

The government may also attempt to argue that *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) and *Federal Communication Commission v. League of Women*

Voters, 468 U.S. 364, 400 (1984), hold that a condition on free speech rights is permissible if alternative means of communication are available. The court in *Branch Ministries* did conclude that alternative means of communication were available to the church because the church could start up an affiliate political organization under § 501(c)(4).[56] *See Branch Ministries*, 211 F.3d at 172. However, as applied to speech from the pulpit, creating a separate organization does not accomplish the church's goal. The pastor speaks as the religious leader of his church, not as the head of a political organization. The pastor also explicates religious doctrine and applies it to various situations for the congregation. The fact that it is the pastor of the church that *speaks for the church*, and not for some affiliate organization formed for political action, is what gives import to what is said. A 501(c)(4) organization cannot speak with the same religious voice as the church itself. Additionally, because the speech at issue is not political speech, but is core religious expression, a (c)(4) organization cannot speak in the same manner or authority as the church itself can on such matters. It is nonsensical to say that a church can speak on matters of religion in every area of life, excepting only political candidates, where it then must tell its congregants to attend a separate

[56] This also highlights the curious fact that IRS guidelines consistently push churches toward more "political" involvement than they would otherwise seek. If a church wishes to inform its congregation about a candidate's moral choices on abortion and marriage, it must "inflate" a voter's guide to include political issues in which it has no interest. If a church wants to speak once on the moral qualifications of a person to govern, then under *Branch Ministries* it must create a separate organization to front for a formal PAC. Both factors undercut the government's purported interest of preventing tax-exempt political speech.

political action committee meeting to hear an explanation of religious doctrine as applied to political candidates. This is simply not an equivalent alternative means of communication.

The deterrent effect of the denial of the exemption is akin to a penalty or fine levied for religious expression. The prohibition is censorship, and taxing church resources that have no connection with elections penalizes the church leaders and their congregations for exercising First Amendment rights. Revocation of tax exemption is an overbroad response to the goal of preventing the use of deductible funds in political campaigns. Therefore, § 501(c)(3), as applied to taxing speech from the pulpit, violates the First Amendment's Free Speech Clause.

C. Taxing Speech From The Pulpit Violates The Free Exercise Clause.

Section 501(c)(3)'s restriction violates the Free Exercise Clause because it operates as a substantial burden on religion without a compelling governmental interest, and it amounts to express discrimination against religious speech. Under the First Amendment's free exercise of religion clause, neutral and generally applicable laws are judged by rational basis scrutiny. *See Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 879-881 (1990). The Court, however, has spelled out exceptions where a law burdening religious exercise is subject to strict scrutiny. In *Smith*, the Court held that when the Free Exercise claim was made "in conjunction with other constitutional protections, such as

freedom of speech and of the press," strict scrutiny would apply to a law burdening religious exercise. *Id.* at 881. Such "hybrid" situations require strict scrutiny analysis. Assuming, *arguendo*, that § 501(c)(3) is a neutral law of general applicability, then applying the Johnson amendment to speech from the pulpit raises not only Free Exercise, but also obvious Free Speech concerns. In such hybrid situations, the restriction is unconstitutional unless it satisfies the strict scrutiny analysis.

Strict scrutiny is also applied to regulations that are not neutral toward religion or generally applicable to all persons. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Johnson amendment's restriction on political pulpit speech is such a law.

In *Lukumi*, practitioners of the religion of Santeria challenged a city ordinance restricting ritualistic animal sacrifices. *See id.* at 525-35. The plaintiffs argued that the city targeted them when it enacted and enforced the ordinance. The Court noted that there was no facial discrimination in the ordinance. It held, however, that a lack of facial discrimination was not the end of the neutrality inquiry. *Id.* at 534. The Court stated:

> Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," and "covert suppression of particular religious beliefs." Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.

Id. (quoting *Gillette v. U.S.*, 401 U.S. 437, 452 (1971); *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)). The Court looked at the actual operation and the effect of the ordinance to conclude that the ordinance targeted the religious beliefs of the Santeria religion. The ordinance there allowed the killing of animals in many different ways, but specifically prohibited the ritualistic killing of animals conducted only by the Santeria religion. The Court stated, "The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice...." *Id.* at 536. The Court concluded, "It is not unreasonable to infer . . . that a law which visits 'gratuitous restrictions' on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Id.* at 538 (citation omitted). The Court then struck down the regulation as unconstitutional.

In this case, although the face of the IRS provision is facially neutral, it is still unconstitutional because it specifically suppresses religious expression. And like the City of Hialeah, which targeted Santeria practitioners, the IRS is targeting the religious expression of pastors. Although the language of the restriction only prevents a church from participating in a political campaign, the IRS has interpreted this to mean that even the religious speech of a pastor can be forbidden. Moreover, IRS regulations and rulings make clear that it pays special attention to the speech restriction when churches are concerned. "Increasingly, the IRS has

been accused of selectively enforcing the Code against churches depending upon the content of the speech or the activity. The IRS can target whomever it chooses."[57] *See also* S. Rep. No. 938, pt. 2, at 80 (1976), reprinted in 1976 U.S.C.C.A.N. 4030, 4104 (Senate Finance Committee stating that the restriction presented selective enforcement problems because the standards are "too vague and thereby tend to encourage [it]").

Under strict scrutiny, the plaintiff church or pastor must show that the conduct is motivated by a sincerely held religious belief, and that the government has directly or indirectly burdened this conduct. *See Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963). Then the government must show that its action is justified by a compelling interest, and that no less restrictive or burdensome means is available to achieve that interest. *Id.* at 406-07.

Pastors who speak for or against a candidate during a Scripture-based sermon do so because of their sincerely held religious beliefs. Since the government conditions tax exempt status on their silence, this amounts to a substantial burden on constitutionally protected expression. For example, in *Rigdon*, 962 F. Supp. 150, the District Court for the District of Columbia concluded that chaplains would be substantially burdened if they could not encourage other soldiers to support a legislative override to President's Clinton's

[57] Smith, *supra* note 45, at 59.

veto of the Partial Birth Abortion Ban Act. *Id.* at 161. In that case, the chaplains successfully argued that the prohibition was "a substantial burden because the preaching of military chaplains is censored." The Court agreed. *Id.*

In practice, such restrictions also yield absurd results, as noted by the *Rigdon* Court. "If, after an emotional sermon about the 'abomination' of . . . abortion, congregants were to rise from the pews and ask [their chaplains] what they can do to stop this practice, these chaplains would have to respond, 'I cannot say.'" *Id.* at 164. It is bizarre indeed that a pastor may preach that a certain Scripture-based question is the most important issue of our time, but he may not then state how one candidate or the other would act on that issue. In simple terms, under the Johnson amendment a pastor cannot inform his congregants of how they may vote in line with the Bible.

As noted above, the case of *Branch Ministries v. Rossotti*, 211 F.3d 137, 142-43 (D.C. Cir. 2000), involved a full page ad in USA Today urging Christians to vote against Bill Clinton for President. The court found there was no substantial burden in temporarily revoking a church's § 501(c)(3) tax exempt status. This conclusion, however, is inapposite to the present case. First and most importantly, the church in *Branch Ministries* never claimed that a withdrawal from "electoral politics" would violate its beliefs. *See id.* at 142. The church could thus not claim a substantial burden if it conceded its religious beliefs would not be violated by the

IRS action in that case.

We raise a very different issue—expounding religious doctrine from the pulpit, which is among the most essential functions of a pastor. Thus, the limit on pastoral speech constitutes a direct and substantial burden on religion. Conditioning a tax exemption on silence from the pulpit on crucial religious teaching is a direct and substantial burden even under the most cramped definition of substantial burden.[58]

Second, the court based its conclusion on a supposed equivalency between tax exemption and subsidization, arising from faulty applications of *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990), and *Regan*, 461 U.S. 540. *See Branch Ministries,* 211 F.3d at 142-43. The court stated that no substantial burden existed, since the church would simply have less

[58] The phrase "substantial burden" has been defined inconsistently in different jurisdictions. *See e.g., Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 761 (7th Cir. 2003) (stating that a law that "imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise-including the use of real property for the purpose thereof within the regulated jurisdiction generally-effectively impracticable."). Other jurisdictions have defined that phrase more leniently. *See e.g., San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024, 1034 (9th Cir. 2004) (holding that a "'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."); *see also Lovelace v. Lee,* 472 F.3d 174, 187 (4th Cir. 2006) (holding that "a substantial burden on religious exercise occurs when a state or local government, through act or omission, 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"). These definitional disagreements came in the context of interpreting and applying RLUIPA, but it is reasonable to believe that such disagreements will also occur, at least at the lower court level, in the First Amendment or Federal RFRA context as well. However, even under the most restrictive definition of substantial burden, the restriction in 501(c)(3) renders religious exercise on the issue of the Bible's commands as related to specific candidates, effectively impracticable.

operating money because of the lost exemption, which was not considered a substantial burden. *Id.* *Jimmy Swaggart Ministries*, however, involved taxes imposed on retail sales of religiously-related items, not taxes on the religious speech of a pastor in his pulpit. Thus, in *Jimmy Swaggart Ministries*, the tax was legitimately laid on commercial activity, not upon pastoral speech. *Regan* described tax exemption as a form of subsidy, but this was in contravention of *Walz*'s distinction of the two, especially as applied to religious speech. *Compare Walz*, 397 U.S. at 675, *with Regan*, 461 U.S. at 544. Moreover, *Branch Ministries* justified the speech restriction on the demonstrably unworkable distinction between what constitutes religious versus political speech. *See* 40 F. Supp. 2d at 25 (stating that the church's revocation was not based on "their religious beliefs" but on their "political activity"), *aff'd,* 211 F.3d 137. This was the distinction correctly rejected in *Rigdon*. *See Rigdon,* 962 F. Supp. at 164; *see also Widmar,* 454 U.S. at 270 n.6 (noting the futility of the government attempting to distinguish a religious viewpoint from religious worship).

III.

TAXING SPEECH FROM THE PULPIT VIOLATES THE FEDERAL RELIGIOUS FREEDOM RESTORATION ACT ("RFRA").

The Religious Freedom Restoration Act of 1993, codified at 42 U.S.C. § 2000bb-1, requires that all laws that substantially burden the exercise of religion

are subject to strict scrutiny even if they are neutral and generally applicable. While the Supreme Court held RFRA unconstitutional as applied to the states in *Boerne v. Flores*, 521 U.S. 507 (1997), RFRA still remains in force and binds federal agencies. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

RFRA has no requirement that a law not be neutral or generally applicable before strict scrutiny may be applied. Rather, if the law substantially burdens the exercise of religion, it is subject to strict scrutiny. As described above, applying the Johnson amendment to pastoral speech substantially burdens the exercise of religion. That is unlawful, absent a compelling governmental interest advanced in the least restrictive means available. As demonstrated above, there is no compelling interest and any interest the government has is not advanced in the least restrictive means available. Therefore, the restriction violates RFRA.

CONCLUSION

Federal law restricting Bible-based sermons, given from the pulpit, that address the candidates from a Scriptural viewpoint violates the First Amendment and RFRA. Under the Establishment Clause, the restriction fails because of excessive entanglement. The restriction is equally unconstitutional because it is a content-based restriction and cannot survive strict scrutiny. It is also constitutionally defective as an unconstitutional condition on religious speech.

The restriction also violates the free exercise of religion because it discriminates against pulpit sermons. Applying the restriction to religious expression also burdens free speech rights, resulting in a "hybrid" claim which requires invalidation under the First Amendment. And the resulting burden on religion would lead to striking the regulation under RFRA's strict scrutiny standard.

Appendix A

What follows are some selected sermons endorsing or opposing candidates for office. These sermons were collected by David Barton of Wallbuilders from original resources and the editorial notes therein are from Mr. Barton.

Sermon by John Mitchell Mason in 1800:
Fellow Christians,

A crisis of no common magnitude awaits our country. The approaching election of a President is to decide a question not merely of preference to an eminent individual, or particular views of policy, but, what is infinitely more, of national regard or disregard to the religion of Jesus Christ. Had the choice been between two infidels or two professed Christians, the point of politics would be untouched by me. Nor, though opposed to Mr. Jefferson, am I to be regarded as a partisan; since the principles which I am about to develop, will be equally unacceptable to many on both sides of the question. I dread the election of Mr. Jefferson, because I believe him to be a confirmed infidel: you desire it, because, while he is politically acceptable, you either doubt this fact, or do not consider it essential. Let us, like brethren, reason this matter.

The general opinion rarely, if ever, mistakes a character which private pursuits and public functions have placed in different attitudes; yet it is frequently formed upon circumstances which elude the grasp of argument even while they make a powerful and just impression. Notwithstanding, therefore, the belief of Mr. Jefferson's infidelity, which has for years been uniform and strong, wherever his character has been a subject of speculation – although that infidelity has been boasted by some, lamented by many, and undisputed by all, yet as it is now denied by his friends, the charge, unsupported by other proof, could hardly be pursued to conviction. Happily for truth and for us, Mr. Jefferson has *written*; he has *printed*. While I shall not decline auxiliary testimony, I appeal to what he never retracted, and will not deny, his *Notes on Virginia*.[59] [p. 8]

. . .

Yet Christians are uniting with infidels in exalting an infidel to the chief magistracy! If he succeeded, Christians must bear the blame. Numerous as the

[59] The edition which I use is the second American edition, published at Philadelphia, by Matthew Carey, 1794.

infidels are, they are not yet able, adored by God, to seize upon our "high places." Christians must help them, or they set not their feet on the threshold of power. If, therefore, an infidel presides over our country, it will be YOUR fault, Christians; and YOUR act; and YOU shall answer it? And for aiding and abetting such a design, I charge upon your consciences the sin of striking hands in a covenant of friendship with the enemies of your master's glory. Ah, what will be your compunction, when these same infidels, victorious through *your* assistance, will "tread you down as the mire in the streets," and exult in their triumph over bigots and bigotry.

Sit down, not, and interrogate your own hearts; whether you can, with a "pure conscience," befriend Mr. Jefferson's election? Whether you can do it *in the name of the Lord Jesus*? Whether you can life up your heads and tell him that you promote it in the faith of his approbation? Whether, in the event of success, you have a right to look for his blessing in the enjoyment of your President? Whether, having preferred the talents of a man before the religion of Jesus, you ought not to fear that God will blast these talents; abandon your President to infatuated counsels; and you yourselves to the plague of your own folly? Whether it would not be just to remove the restraints of his good providence, and scourge you with that very infidelity which you did not scruple to countenance? Whether you can, without some guilty misgivings, pray for the spirit of Christ upon a President whom you choose in spite of every demonstration of his hatred of Christ? Those who, to keep their consciences clean, oppose Mr. Jefferson, may pray for him, in this manner, with a full and fervent heart. But to *you*, God may administer this dread rebuke: "You *chose* an infidel: *Keep him* as ye chose him: walk in the sparks that ye have kindled." Whether the threatenings of God are not pointed against such a magistrate and such a people? [pp. 37-38]
- John Mitchell Mason,**A Voice of Warning to Christians, on the Ensuing Election of a President of the United States* (New York: G.F. Hopkins, 1800).

*Note: Info on John Mitchell Mason
John Mitchell Mason was born on March 19, 1770 in New York City. He attended Columbia University, receiving a bachelor's degree in 1789. In 1792 Mason succeeded his father as pastor of a small ministry in New York. During his tenure with this congregation, he quickly expanded the membership by 600 people. In 1794 Mason received a doctor of divinity degree from Princeton University. He established and organized the first theological seminary of the Associate Reformed Church (now Union Theological Seminary) in 1804, and he helped to establish the *Christian Magazine* in 1806. He also served as a trustee of Columbia University from 1795 to 1811, and was provost of that institution from 1811 to 1816. While serving as provost, Mason became minister of the Murray Street Church in New

York City in 1812. Declining health from excessive work forced him to take leave of his duties in 1816, and then again after suffering a slight stroke upon his return. Following this second recovery, Mason accepted a position as president at the newly reopened Dickinson College, beginning his term in the fall of 1821.http://deila.dickinson.edu/theirownwords/author/MasonJ.htm

Election Sermon by Aaron Bancroft in 1801:

"The large majority by which his Excellency is re-elected to the chief seat of government, evidences the approbation of the Commonwealth of his past services in this elevated and responsible office. Unanimity, at this day, was not an object of expectation., It is an honorable testimonial of personal merit, that his support has been the greatest where his private character was best known. The unanimous suffrage of those who were conversant with his walks in social life, must be grateful to the feelings of his Excellency. Confident that he will lend the united force of his authority and example to support the institutions of religion, and to preserve the purity of public morals; that he will execute his trust in righteousness, and with an impartial view to the general good we wish him the guidance of Heaven."

-Aaron Bancroft, *A Sermon Preached Before His Excellency Caleb Strong, Esq., Governor, The Honorable the Council, Senate and House of Representatives, of the Commonwealth of Massachusetts, May 27, 1801, The Day of General Election* (Boston: Young & Minns, 1801), pp. 23-24.

Election Sermon by Matthias Burnet in 1803:

"Yet I am well aware that one of these qualifications, viz. the fear of God, is by numbers, thought to be of very little consequence, and some there are, who even deride the very idea of paying any attention to it all, declaring our dearest interests to be as safe in the hands even of an atheist, as any other man. But with that great patriot and statesman the late governor Livingston of New Jersey, I must yet think that this is a qualification of very great importance in a ruler."

-Matthias Burnet, *An Election Sermon Preached at Hartford, on the Day of the Anniversary Election, May 12, 1803* (Hartford: Hudson & Goodwin, 1803), p. 15.

William Linn (1752-1808: Stated by Evans, but not on cover), *Serious Consideration on the election of a President" Addressed to the Citizens of the United* States (New York: John Furman, 1800)

p. 4

"It is well understood that the Honorable Thomas Jefferson is a candidate for the Chief Magistracy of the United States, and that a number of our citizens will him

all their support I would not presume to dictate to you *who* ought to be President, but entreat you to hear with patience, my reasons why *he* ought not.
p. 30
Do not apprehend me to be an advocate for the other candidates.* At the same time I will say nothing against them. They are, I have reason to believe, irreproachable. But there are many others, and you know that there are, who would fill the office of President with reputation and usefulness. Necessity, therefore, you cannot plead; and I will venture it as my serious opinion, that rather than be instrumental in the election of Mr. Jefferson, it would be more acceptable to God and beneficial to the interests of your country, to through away your vote.
*Mr. Pinckney and Mr. Adams
p. 32
I beg you not to depend upon sureties who may themselves be bankrupts in the faith. Such will seek to banter you out of your conscience scruples, and it they cannot, will give you strong assurance. It is a case in which you cannot admit a surety. The question is not what he will *do*, but what he *is*. Is he an infidel? Then you cannot elect him without betraying your Lord. No circumstance can warrant your preference of him. I beg you also to remark, that a character must be suspicious when great pains are thought necessary to clear it up. Why all these pains, and what need of sureties? There is a short and easy way to settle the whole business. Let Mr. Jefferson only set his name to the first part of the apostle's creed, "I believe in God, the Father Almighty, maker of heaven and earth. And in Jesus Christ, his only begotten Son, our Lord." Can the ministers of the gospel, who are jealous for the glory of God, and the people to whom Christ is precious, require and expect less? You will hear it said that whatever may be the character of Mr. Jefferson, he is not worse than many of those who censure him. Were this true, it would not excuse his elevation. To choose a bad man because others are bad, can never be a sufficient reason, unless all are equally bad.
pp. 34-35
To conclude, I have not set my name to this address; not because I am either afraid or ashamed; but because I wish it to be fairly judged by its own merits distinct from every other consideration. On this account I wish to always be concealed; at the same time, if any apparent necessity should occur, I shall immediately become known. I would feel criminal had I expressed myself with less warmth. I rather fear that I have not risen to what the cause demanded. Against Mr. Jefferson I have no personal resentment. He and I can never be competitors for any place of honor and emolument. Separate him from his principles, and I could write his eulogium. Let me further repeat, that no answer is intended in this address to his philosophical and religious principles; that the single thing intended, is to show that these principles are contrary to what we are taught in the holy scriptures, and that for this

reason alone, he ought not to be honored and entrusted with the Presidency of the United States of America." (Evans37835)

Appendix B

What follows are some selected sermons gathered by David Barton of Wallbuilders demonstrating that churches have been at the forefront in speaking on the great social issues of our country.

Judges/ Judiciary:

"Even at this distance, our Judges reflect the King's image; they hold a regal office, they execute a kingly power, perform princely duties and dispense royal blessings. Certainly they picture a good Prince when they are as "eyes to the blind, feet to the lame, and fathers to the poor." When they impartially and thoroughly examine into the merits, strip off the false coloring, unfold the intricacies and set forth in a clear and conspicuous light, the truth and equity of every dark and perplexed cause that is laid before them or when they either diligently study to find out the hidden spring of vice I men or explore the secret places of wickedness among them, either personally or by their servants, so that they may drag into open light the lurking hungry villain and "break the jaws of the wicked and pluck the soil out of his teeth."[p. 20]

"And in giving cases to the jury they may also for the most part greatly assist them. I presume very good judge in this affair which so nearly concerns him, will always carefully endeavor to deliver his sentiments with as much seriousness, moderation, impartiality, perspicuity, firmness and intrepidity as the case requires, that his judgment may be as robe and a diadem to himself, as well as the eyes to the jury. [p. 22]

As court affairs and business of magistrates in general require to be transacted seasonably so it is very evident some of their duties should be performed with great solemnity. Particularly those of administering oaths, examining witnesses and criminals, pronouncing judgment in all cases, especially upon the most notorious offenders. [p. 23]

In the character you sustain, as judges, it is expected that you will administer justice at all times, impartially and uprightly according to the laws and the true intention of your office. The great design you will ever keep in view and pursue it a with all the prudence and resolution it deserves through the whole of your administration." [p. 26]

-Bunker Gay, *The Accomplished Judge; or a Complete Dress for Magistrates: A Sermon Preached at Keene at the First Opening of the Inferior Court, in the County of Cheshire October 8, 1771* (Portsmouth: D. Fowle, 1773).

-Ezra Stiles Gannett, *The Good Judge: A Sermon, October 17, 1847, After the Death of Hon. Artemas Ward* (Boston: S. A. Green, 1847).

Marriage:
"Marriage has been called by many a Civil Contract, in which a man and woman unite together for life. But I am rather inclined to think it ought to be called a Religious Contract, from the comment Christ gave upon Moses' giving bills of divorce. But, whatever people call it, civil or religious, it is an important and interesting connection; and for this cause, God made them male and female and they leave father and mother, and covenant together, and of twain become one." p. 4
"Marriage is honorable, in that it is beneficial and for the happiness of individuals; but more especially for the general good and use of the world; and as it is lawful in itself, both by civil and divine statutes, it must be reputable and highly commendable for people to celebrate the ordinance." p. 5
-Josiah Carpenter, *The importance of Right Views in Matrimony,* (Gilmanton, 1800), Evans 49043, pp. 4-5.

Secession:
"If we have been idolatrous in our love of country, we must dislodge this usurper, and invite to the shrine Him who claims our hearts. We must learn to lean less on our boasted and powerful Union, and more on that unseen but almighty Hand whence our real strength must be derived."
-William T. Brantly, *Our National Troubles: A Thanksgiving Sermon, Delivered in the First Baptist Church, Before the First and the Tabernacle Baptist Congregations of Philadelphia, on Thursday Morning, Nov. 29, 1860* (Philadelphia: T.B. Peterson & Brothers, 1860).[secession sermon]

Slavery:
"How an evil of so deep a dye have so long not only passed uninterrupted by those in power but hath even had their countenance is indeed surprising and charity would suppose in a great measure arisen from this that many persons in government, both of the clergy and laity in whose power it hath been to put a stop to the trade, have been unacquainted with the corrupt motives which give life to it."
-Anthony Benezet, *A Caution and Warning to Great Britain and Her Colonies In a Short Representation of the Calamitous State of the Enslaved Negroes in the British Dominion,* (Philadelphia, Hall & Sellers, 1767).

Revolutionary War:

"The pulpit is devoted, in general, to more important purposes than that of kingdoms, or the civil rights of human nature, being intended to recover men from the slavery of sin and Satan, to point out their escape from future misery through faith in a crucified Jesus, and to assist them in their preparations for an eternal blessedness. But still there are special times and seasons when it may treat of politics. And, surely, if it is allowable for some who occupy it, by preaching upon the doctrine of non-resistance and passive obedience, to vilify the principles and to sap the foundation of that glorious revolution that exalted the House of Hanover to the British throne, it ought to be no transgression in others, nor to be construed into a want of loyalty, to speak consistently with those approved tenets that have George the Third the first of European sovereigns, who otherwise, with all his personal virtues, might have lived an obscure Elector.

Having, then, the past morning of this provincial thanksgiving, accommodated the text to the cases of individuals, I shall now dedicate it, according to its original intention, to the service of the public, the situation of whose affairs is both distressing and alarming.

The capital of the colony is barbarously treated, pretendedly for a crime, but actually for the noble stand she has made in favor of liberty against the partisans of slavery....[pp. 1-2]

The important day is now arrived that must determine whether we shall remain free, or alas be brought into bondage, after having long enjoyed the sweets of liberty. The event will probably be such as is our own conduct. Will we conform to the once exploded but again courtly doctrines of passive obedience and non-resistance, rather than hazard life and property- we may have the honor of burning under the heats of summer and freezing under the colds of winter in providing for the luxurious entertainment of lazy, proud, worthless pensioners and placement.

Will we make our appeal to Heaven against the intended oppression- venture al upon the noble principles that brought the House of Hanover into the possession of the British diadem, and not fear to bleed freely in the cause, not of a particular people, but of mankind in general- we shall be likely to transmit to future generation, though the country should be wasted by the sword, the most essential part of the fair patrimony received from our brave and hardy progenitors – the right of possession of and disposing of, at our own option, the honest fruits of our industry...[pp. 6-7]

Here allow me to run through a brief summary of these favorable circumstances, composed of the following particulars: The rising and growing consistency of sentiments in the friends of liberty, which hath led one assembly and another on this continent to attempt preventing the further introduction of slaves among them, though herein they have been counteracted by governors, and

which the American Congress has with so much wisdom and justice adopted; the increasing acquaintance with the rights of conscience in matters of religion, as belonging equally alike to men of all parties and denominations, while they conduct as good members of civil society, without endeavoring to injure their neighbors of different or opposite sentiments; the blundering policy of the British ministry in giving so cruel a cast to the Boston Port Bill, taking away by it private property, and subjecting is restitution to the pleasure of the sovereign; in following that so hastily with other acts, equally unjust and more extensively pernicious, affecting the whole colony, and built upon principle and claims that rendered every dwelling, plantation, and right through the continent precarious...; in declaring openly, while supporting the bills, that their design was not against a single town or colony, but against all America; in presuming that the other towns and colonies, upon receiving the dreadful news, would turn pale and tremble, conceal their spirit of resentment and opposition in sneaking professions of tame submission, and abandon the distressed, though their own ruin must have following upon it, however slowly; and, upon such presumption, neglecting to divide in time the different colonies by flattering promises suited to their several situations, and by secret purchases, ere they could form a general union; the reestablishment of arbitrary power and a despotic government in a most extensive and purposely enlarged country, contrary to the royal declaration given a few years before, qualified somewhat to the inhabitants by that formal security of their religious liberty...;the speedy arrival of the Port Bill in the common way of conveyance...; its arrival at Boston, New York and Virginia nearly at the same time; the firmness that the Bostonians showed upon the occasion; the indignation with which it was received, as the news flew though the continent; the spirited behavior of the noble Virginian Assembly, whereby they hastened their own dissolution;...the fixing upon a general congress and choosing delegates although in several places governmental chicanery was used to prevent it... It proved the means of showing that the colonists were not to be intimidated, thought martial appearances were to terminate in actual hostilities; that they would be volunteers in the case of liberty; and that they meant not to avoid fighting, whenever it became necessary." [pp. 18-22]

-William Gordon, *A Discourse Preached December 15, 1774, Being the Day Recommended by the Provincial Congress* (Boston: Thomas Leverett, 1775).

"As our case, at the present time, is in a considerable degree analogous to his, I shall apply the words of the text to ourselves, and take occasion from them to show,

1. That this our land is God's possession, which He has given us to inherit,

2. That no other man, or body of men, have a right to this possession, or any part of it, unless we see cause to give it to him, or them, for some good or valuable consideration; and therefore,

3. Great Britain in sending a army to turn us out of our possession, merely because we will not resign up ourselves and property, to be disposed of as her will and discretion, ,is unjust and barbarous; and therefore,

4. As this army is come up against us, and as we cannot trust in the arm of flesh or upon our counsels alone, we ought to have our eyes upon God, for him to espouse our cause, and put an end to the quarrel." (Evans 14474)

- William Stearns, *A Sermon Preached at a Fast in Marlborough in Massachusetts Bay on Thursday, May 11, 1775. Agreeable to a Recommendation of the provincial* Congress (Watertown: Benjamin Edes, 1775) p. 11- 12